Filed 9/29/09 Nawa v. Baluyot CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

TOSHINORI NAWA, Plaintiff and Respondent, v. REUEL M. BALUYOT et al., Defendants and Appellants.	A121053 and A121056 (San Mateo County Super. Ct. No. CIV 467542)

This is an appeal from an order denying the special motion to strike filed by appellants Florence S. Phillips and Luscutoff Lendormy & Associates pursuant to Code of Civil Procedure section 425.16 (hereinafter, section 425.16). The trial court denied the motion after finding that respondent Toshinori Nawa's lawsuit was not based on conduct falling within the scope of section 425.16. The trial court thereafter permitted appellant Reuel M. Baluyot to join in the motion for purposes of appeal.

For reasons set forth below, we affirm the trial court's decision in part and reverse in part, concluding that Nawa's cause of action for constructive fraud is barred by section 425.16, but that his remaining causes of action are not.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2007, Nawa filed a complaint against Baluyot, Phillips, and Luscutoff Lendormy & Associates (collectively, appellants) for breach of fiduciary duty, breach of escrow agreement and order, negligent infliction of emotional distress, and constructive fraud. The complaint arose out of appellants' representation of Nawa's wife, Miyuki Nawa, in her dissolution of marriage action against Nawa. Appellants Baluyot

and Phillips are licensed attorneys who at all relevant times performed legal work on behalf of appellant Luscutoff Lendormy & Associates (LL & A).

On February 20, 2007, appellant Baluyot represented Mrs. Nawa at a hearing regarding child custody and support and other issues. At the hearing, the trial court addressed Nawa's concern that Mrs. Nawa, a Japanese citizen, would leave the country with the couple's three minor children. Appellant Baluyot advised the trial court of the parties' agreement that appellants would hold the passports of the children for safekeeping. The court thereafter issued an order, dated February 20, 2007, that provided in relevant part:

"Neither party may leave the country with children without prior agreement and showing of itinerary to other parent. Petitioner counsel to keep passports at this time."

A few weeks after this order was entered, appellants' representation of Mrs. Nawa ended for reasons not clear from this record. On March 27, 2007, appellant Phillips executed and filed a substitution of counsel form in the marriage dissolution matter, removing LL & A as attorneys of record for Mrs. Nawa.

On April 3, 2007, Nawa's counsel wrote to appellants advising that she had received the substitution of counsel form the previous afternoon, and requesting that appellants provide her the children's passports to prevent Mrs. Nawa from taking them out of the country without Nawa's consent. The letter stated in relevant part as follows: "***Importantly, please provide me with the children's passports which were to be held by your [sic] to prevent [Mrs. Nawa] from leaving the country with the children without Mr. Nawa's consent.*** If you do not have the passports in your possession please inform me immediately as my client has sincere concerns regarding this issue."

The same day, appellant Baluyot responded to the letter of Nawa's counsel, advising that "[t]he children's passports you inquired about are with Ms. Nawa."

Approximately three days later, on April 6, 2007, Mrs. Nawa left the country for Japan with the children through a connecting flight from Los Angeles. As of February 1, 2008, neither Nawa nor the law enforcement agencies investigating the matter have had

any contact or communication with Mrs. Nawa or the children.[1] As a result, Nawa has undergone medical treatment for a variety of physical and mental ailments, including anxiety, depression and sleeplessness.

On January 14, 2008, appellants Phillips and LL & A filed a special motion to strike pursuant to section 425.16, arguing that the causes of action in Nawa's complaint arise from their constitutionally-protected petitioning activities on behalf of Mrs. Nawa. Appellants further argued that Nawa cannot establish a probability of prevailing on the merits of his causes of actions, relying on the affirmative defenses of the litigation privilege and the attorney-client privilege. In addition, appellant Phillips filed a declaration wherein she attested that at no time did she or any other agent of LL & A come into possession of the Nawa children's passports, and that it was the collective understanding of LL & A that, at all relevant times, the passports were held by Mrs. Nawa.

On January 16, 2008, appellant Baluyot filed a demurrer to Nawa's complaint, also relying on the affirmative defenses of the litigation privilege and the attorney-client privilege.

On February 15, 2008, the trial court heard both the special motion to strike and the demurrer. In doing so, the trial court permitted appellant Baluyot to join appellants Phillips' and LL & A's motion to strike. Thereafter, the trial court adopted its tentative rulings to deny the motion and to overrule the demurrer. In denying the motion to strike, the trial court found in relevant part that "the action is based on Defendants [sic] disregard and noncompliance with a court order, there is no chilling effect to the right of free speech."

This timely appeal of the trial court's denial of the special motion to strike followed.

---

[1] An arrest warrant has been issued for Mrs. Nawa charging her with three felonies and a misdemeanor.

DISCUSSION

On appeal, appellants challenge the trial court's decision to deny their special motion to strike pursuant to section 425.16 on two grounds: (1) the causes of action raised in Nawa's complaint arise from appellants' acts in furtherance of their constitutional right of petition, and thus are subject to the special motion to strike; and (2) Nawa failed to demonstrate a probability of prevailing on the merits of his causes of action.[2] In addition, appellants seek to recover attorney's fees and costs incurred in bringing the motion.

Section 425.16, the "anti-SLAPP" statute, provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[3] (§ 425.16, subd. (b)(1).)

For purposes of the anti-SLAPP statute, "[an] 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of

---

[2] An order denying a special motion to strike pursuant to section 425.16 is immediately appealable. (§ 425.16, subd. (i); *Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1520.)

[3] "SLAPP" is an acronym for a strategic lawsuit against public participation. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1, citing Canan & Ping, *Strategic Lawsuits Against Public Participation* (1988) 35 Soc. Probs. 506.)

the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Consistent with this statutory language, courts apply a two-prong test when ruling on a special motion to strike. First, the moving defendant must make a prima facie showing that the acts that are the subject of the plaintiff's claims were performed in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue. (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67; § 425.16, subd. (b).) If the moving defendant makes this requisite showing, the burden then shifts to the plaintiff to establish, based on competent and admissible evidence, a probability of prevailing on the merits of the plaintiff's claims. (*Ibid*.; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navallier v. Sletten* (2002) 29 Cal.4th 82, 89.)

On appeal, we review a trial court's ruling on a special motion to strike de novo. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) In doing so, we consider the pleadings and the evidence offered in support of and in opposition to the motion, but we do not consider the credibility of witnesses or the weight of the evidence. (*Ibid*.) We also keep in mind that the legislative purpose underlying the anti-SLAPP statute is to promptly dismiss meritless lawsuits designed to chill a defendant's exercise of the constitutionally-protected rights to free speech and petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109; § 425.16, subd. (a).)

I. Do Nawa's Claims Arise From Acts in Furtherance of the Right to Petition?

Appellants contend Nawa's complaint in its entirety is subject to the anti-SLAPP statute because each cause of action arises from appellants' protected petitioning activities – to wit, their statements made in court proceedings during their representation of Mrs. Nawa in the dissolution of her marriage with Nawa.

Nawa counters that his lawsuit is premised upon appellants' violation of the court order requiring them to hold his children's passports, which is not a protected activity

under the anti-SLAPP statute. Accordingly, Nawa argues, the trial court properly denied appellants' special motion to strike based upon their failure to satisfy the first prong of section 425.16.[4]

The California Supreme Court has explained the first prong of section 425.16 as follows: "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] . . . [T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' " (*City of Cotati v. Cashman, supra,* 29 Cal.4th at p. 78. See also *Navallier v. Sletten, supra,* 29 Cal.4th at p. 89.)

Further, where a cause of action alleges both protected and nonprotected activities, section 425.16 does not apply if the protected activities are "merely incidental" or "collateral" to the nonprotected activities. (*Peregrine Funding Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672. See also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.)

Applying these principles to the case at hand, we thus turn to the allegations in Nawa's complaint to determine whether the principal thrust or gravamen of each cause of action is protected or nonprotected activity.

---

[4] As an initial matter, Nawa argues that the trial court erred in permitting appellant Baluyot to join for purposes of appeal the anti-SLAPP motion filed by appellants Phillips and LL & A. As set forth above, Baluyot filed a demurrer to Nawa's complaint that was overruled by the trial court and is not the subject of this appeal. At the hearing on both the demurrer and the anti-SLAPP motion, Baluyot's attorney advised the trial court that "we are also joining, for the purposes of appeal if necessary, in the Motion to Strike which provides for an automatic appeal." Baluyot apparently did not file a subsequent notice of joinder. Nonetheless, Nawa made no objection to this purported joinder before the trial court. As such, we decline to consider Nawa's belated objection on appeal, concluding that the issue has been waived. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2008) [¶] 8:229, p. 8-155.) Accordingly, we proceed to the merits of the anti-SLAPP inquiry.

As set forth above, Nawa has raised four causes of action – breach of fiduciary duty, breach of escrow agreement and order, negligent infliction of emotional distress and constructive fraud.

With respect to the breach of fiduciary duty cause of action, Nawa alleges, under the terms of the court order, that appellants owed him a duty to obtain, hold and keep his children's passports to prevent the children from being taken from this country without permission by their client, Mrs. Nawa. Further, Nawa alleges that, as a result of appellants' breach of this duty, he has lost all contact with his children, causing him serious emotional and physical harm.

Nawa's cause of action for breach of escrow agreement and order is based on allegations that, pursuant to the parties' agreement and the court order, appellants were required to act as escrow agents for Nawa by obtaining, holding and maintaining his children's passports. As a result of appellants' failure to do so, it is alleged that Mrs. Nawa was able to leave the country with the children without permission, causing Nawa to lose contact with his children and suffer serious emotional and physical harm.

The negligent infliction of emotional distress cause of action, in turn, is based on allegations that Nawa has suffered severe emotional distress as a result of appellants' breach of their duties to act as his fiduciaries and escrow agents with respect to obtaining, holding and maintaining the children's passports.

Finally, Nawa alleges with respect to his constructive fraud cause of action that appellants falsely represented to the court and to Nawa that they would obtain, hold and maintain his children's passports so the children could not be taken from this country without his permission. According to Nawa, he reasonably relied on these representations, which were false when made because appellants never intended to obtain, hold and maintain the children's passports. As a result of this alleged fraud, Mrs. Nawa was able to leave the country with the children and Nawa has been unable to effectuate their return. In addition, Nawa seeks punitive damages with respect to this cause of action on the ground that appellants' fraud was willful, malicious and intentional.

Considering these allegations, it is apparent that each of Nawa's causes of action is based at least in part on litigation-related activity. Certainly, litigation-related activity in many instances is protected by the right to petition. Whether that is true in this instance, however, depends on whether the references to protected litigation-related activity are merely incidental to a cause of action based essentially on nonprotected activity. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78; *Navallier v. Sletten, supra*, 29 Cal.4th at p. 89; *Freeman v. Schack, supra*, 154 Cal.App.4th at pp. 727, 732.) We thus turn to the case law for guidance.

Several courts have addressed litigation-related activities when applying the anti-SLAPP statute. In *Navallier v. Sletten, supra*, 29 Cal.4th 82, for example, the plaintiffs had sued the defendant, an independent trustee of an investment fund, in federal court for breach of fiduciary duty. (*Id*. at pp. 85-86.) Thereafter, the parties signed an agreement that included a comprehensive release of liability (the release). (*Id*. at p. 86.) A short time later, the plaintiffs filed an amended complaint in federal court, against which the defendant counterclaimed for breach of contract, among other claims. (*Ibid*.) Eventually, the federal court dismissed two of the defendant's counterclaims based on the release, which limited the types of claims he could file in the federal action. (*Id*. at pp. 87, 90.) In addition, the plaintiffs prevailed on summary judgment with respect to some of the remaining counterclaims, the defendant partially prevailed on summary judgment with respect to the plaintiffs' claims, and the jury reached a defense verdict with respect to the plaintiff's remaining claims. (*Id*. at pp. 86-87.)

Just before noticing an appeal in the federal action, the plaintiffs filed this state court action, alleging that the defendant had fraudulently misrepresented his intention to be bound by the release, thereby inducing them to incur litigation costs in the federal action that they otherwise would not have incurred. (*Navallier v. Sletten, supra*, 29 Cal.4th at p. 87.) The plaintiffs further alleged breach of contract based on the defendant's filing of the counterclaims in federal court. (*Ibid*.) The defendant moved to strike under section 425.16. (*Ibid*.)

Concluding that the plaintiffs were complaining of wrongdoing in connection with the defendant's execution of the release, which limited the claims he was entitled to bring in federal court, the California Supreme Court held that the state lawsuit was subject to the anti-SLAPP statute. In doing so, the court explained as follows: "[Defendant] is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's 'arising from' prong." (*Navallier v. Sletten, supra*, 29 Cal.4th at p. 90.)

In another relevant case, *Freeman v. Schack, supra*, 154 Cal.App.4th 719, the Court of Appeal considered a lawsuit by plaintiffs against their former attorney for breach of contract, professional negligence and breach of fiduciary duty. These causes of action were "based on allegations that [the defendant attorney] had entered into a contract by which he assumed attorney-client duties toward plaintiffs but abandoned them in order to represent adverse interests in the same and different litigation." (*Id*. at p. 722.) The defendant attorney moved to strike the complaint under section 425.16, arguing the causes of action were based on acts in furtherance of his constitutional right of petition, including filing a lawsuit and making written or oral statements in court. (*Id*. at pp. 725-726.) The trial court denied his motion. (*Ibid*.) The appellate court affirmed, concluding that the principal thrust of the conduct underlying the plaintiffs' causes of action was not protected petitioning activity: "[P]laintiffs' allegations concerning [defendant's] filing and settlement of the Hemphill litigation are incidental to the allegations of breach of contract, negligence in failing to properly represent their interests, and breach of fiduciary duty arising from his representation of clients with adverse interests." (*Id*. at p. 732.)

Similarly, in *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, the plaintiffs sued their former attorneys for malpractice, alleging, among other things, that the attorneys' negligence resulted in an order striking the plaintiffs' answer and cross-complaint in a civil action in which they had been named as defendants. (*Id*. at p. 628.) The defendant attorneys moved to strike pursuant to section 425.16, claiming the

plaintiffs' causes of action arose from protected activities, including filing pleadings and other papers and appearing on plaintiffs' behalf in court. (*Id*. at pp. 628, 630.) The trial court denied the motion and the appellate court affirmed, concluding that the malpractice claim did not arise out of the attorneys' exercise of petitioning rights, but rather out of their negligent representation of the plaintiffs, including their failure to comply with a discovery statute and two court orders. (*Id*. at pp. 630-632.) The alleged petitioning activities – filing pleadings and declarations in court – were merely evidence of malpractice, not the basis of the malpractice claim. (*Id*. at p. 632.)

Finally, in *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1535, the plaintiff brought a "garden variety legal malpractice action." The trial court denied the defendant law firm's subsequent anti-SLAPP motion and the appellate court affirmed, holding: "A legal malpractice action alleges the client's attorney failed to competently represent the client's interests. Legal malpractice is not an activity protected under the anti-SLAPP statute. That the malpractice allegedly occurred in the course of petitioning activity does not mean the claim arose from the activity itself. Because the [plaintiffs'] malpractice action does not arise from an activity protected under the anti-SLAPP statute, [the defendant law firm] failed to meet its initial burden." (*Id*. at p. 1535.)

Clearly this is not, like *Kolar* and *Jespersen*, a legal malpractice lawsuit. We nonetheless believe these decisions make several observations relevant to our inquiry. In particular, these decisions establish that a cause of action does not become subject to the anti-SLAPP statute merely because the defendant was engaged in litigation-related activities at the time the claim arose. For example, as *Kolar* explains, citing one of the companion cases to *Navallier*: "Although a party's litigation-related activities constitute 'act[s] in furtherance of a person's right of petition or free speech,' it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute. To qualify for anti-SLAPP protection, the moving party must demonstrate the claim 'arises from' those activities. A claim 'arises from' an act when the act ' " 'forms the basis for the plaintiff's cause of action' " . . . .' (*Equilon Enterprises v. Consumer Cause, Inc*.

(2002) 29 Cal.4th 53, 66 [124 Cal.Rptr.2d 507, 52 P.3d 685].) '[T]he "arising from" requirement is not always easily met.' (*Ibid.*) A cause of action may be 'triggered by' or associated with a protected act, but it does not necessarily mean the cause of action *arises* from that act. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77-78 [124 Cal.Rptr.2d 519, 52 P.3d 695] (*Cashman*).) As our Supreme Court noted: 'California courts rightly have rejected the notion "that a lawsuit is adequately shown to be one 'arising from' an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself." [Citation.]' (*Id.* at p. 77.)" (*Kolar, supra*, 145 Cal.App.4th at pp. 1537-1538.)

With these principles in mind, we return to the allegations at hand.

A. The Causes of Action for Breach of Fiduciary Duty, Breach of Escrow Agreement and Order, and Negligent Infliction of Emotional Distress.

Based on the allegations in Nawa's complaint, we conclude his causes of action for breach of fiduciary duty, breach of escrow agreement and order, and negligent infliction of emotional distress are associated with appellants' in-court representations – acts in furtherance of their right of petition – but did not "arise from" those acts. Specifically, the basis of Nawa's complaint with respect to these causes of action is not that appellants were wrong to state in court their agreement to hold the children's passports; rather, it is that appellants were wrong to violate the court order that memorialized their agreement. As such, these causes of action do not qualify for anti-SLAPP protection. (See *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc*. (2008) 164 Cal.App.4th 1108, 1118.)

In reaching this conclusion, we note that appellants nowhere contend their alleged violation of the court order was an act in furtherance of their constitutionally protected right to petition. Rather, appellants suggest the court order is irrelevant, while it is their statements in court that matter. However, unlike the plaintiffs in *Navallier*, even if appellants had made no representations in open court regarding their willingness to hold the children's passports (the protected activity), Nawa nonetheless may have causes of

action based on appellants' violation of the court order that required them to hold the passports (the nonprotected activity). (Cf. *Navallier v. Sletten, supra*, 29 Cal.4th at p. 90.) Otherwise stated, appellants' representations in court may be evidence of their alleged violation of the court order, and thus their alleged breach of duties to Nawa, but their petitioning rights are not otherwise implicated by Nawa's lawsuit. (See *Jespersen, supra*, 114 Cal.App.4th at p. 630; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC*. (2007) 154 Cal.App.4th 1273, 1285.)

Further, in reaching this conclusion, we also disregard appellants' argument that the evidence in this case is insufficient to prove they actually violated the court order to hold the children's passports. Even if true, that issue is not before us. Because, as we just explained, appellants have failed to make the threshold showing that the causes of action for breach of fiduciary duty, breach of escrow agreement and order, and negligent infliction of emotional distress "aris[e] from" an act in furtherance of the rights of petition (§ 425.16, subd. (b)(1)), the fact that they "might be able to otherwise prevail on the merits under the 'probability' step is irrelevant." (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc*. (2003) 110 Cal.App.4th 26, 32.)

This reasoning likewise disposes of appellants' argument that California law does not recognize an independent civil action based upon a party's violation of a court order in other litigation. As appellants point out, the State of California has a "strong policy favoring use of nontort remedies rather than derivative tort causes of action to punish and correct litigation misconduct . . . ." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11.) However, appellants Phillips and LL & A did not file a demurrer to Nawa's complaint for failure to state a viable legal claim. Rather, they filed an anti-SLAPP motion, the trial court's denial of which is the only ruling before us on appeal. And, with that fact in mind, we note that the anti-SLAPP statute does not categorically include or exclude any particular type of action. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navallier v. Sletten, supra*, 29

Cal.4th at p. 92.) " 'Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is not what is critical but rather that it is against a person who has exercised certain rights' (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 652 [49 Cal.Rptr.2d 620])." (*Navallier v. Sletten, supra*, 29 Cal.4th at p. 93.) Accordingly, given our conclusion that appellants have failed to make the threshold showing that Nawa's causes of action for breach of fiduciary duty, breach of escrow agreement and order, and negligent infliction of emotional distress arise from protected petitioning, we need not consider the viability of those causes of action. Rather, we reserve this issue for the trial court on remand.[5]

Moreover, we believe our conclusion in this regard is wholly consistent with the legislative purpose underlying the anti-SLAPP statute. In particular, as explained above, the causes of action for breach of fiduciary duty, breach of escrow agreement and order, and negligent infliction of emotional distress are focused on appellants' disregard of a court order directing them to hold the children's passports – an order intended to prevent the precise event that later happened: Mrs. Nawa's taking of the children from this country without Nawa's consent. As such, these causes of action do not have the chilling effect on advocacy found in claims typically covered by the anti-SLAPP statute, including malicious prosecution and libel claims (see *Kolar*, *supra*, 145 Cal.App.4th at p. 1540), because Nawa is not suing based on appellants' petitioning activities on behalf of his former wife, but rather on their alleged breach of duties they owed him as a result

---

5 We simply note for the record that, in denying the anti-SLAPP motion, the trial court analogized appellants' alleged misconduct to that of the defendant in *Wasmann v. Seidenberg* (1988) 202 Cal.App.3d 752, 756. There, the plaintiff sued the attorney who represented his former wife in marriage dissolution proceedings after the attorney failed to safeguard a grant deed that plaintiff's counsel had given to him during settlement negotiations with instructions to record only upon obtaining for plaintiff $70,000 from his former wife. (*Wasmann*, *supra*, 202 Cal.App.3d at pp. 754-755.) The appellate court reversed the trial court's decision to sustain the attorney's demurrer, reasoning that the attorney "was obligated to prevent recordation of the deed until [the wife] deposited into escrow the sum due to [plaintiff]. Violation of an escrow instruction gives rise to an action for breach of contract; similarly, negligent performance by an escrow holder creates liability in tort for breach of duty." (*Id.* at p. 756.)

of the court order. Accordingly, the Legislature's intent to promptly dispose of claims "brought primarily to chill the valid exercise of [certain] constitutional rights" has not been undermined. (See § 425.16, subd. (a); *Briggs v. Eden Council for Hope & Opportunity*, *supra*, 19 Cal.4th at p. 1109.)

B. The Cause of Action for Constructive Fraud.

With respect to Nawa's constructive fraud cause of action, however, we reach a different conclusion. As set forth above, this cause of action is based on allegations that appellants falsely represented to the court and to Nawa that they would obtain, hold and maintain his children's passports so the minors could not leave the country without his permission. Nawa further alleges these in-court representations, which he reasonably relied upon, were false when made because appellants never intended to obtain, hold and maintain the children's passports.

These alleged acts which provide the basis for Nawa's fraud claim – misrepresentations made in the course of judicial proceedings – fall squarely within the scope of the anti-SLAPP statute. As set forth above, section 425.16, subdivision (e) defines protected petitioning activity to include "statement[s] or writing[s] made before a . . . judicial proceeding . . . ." (§ 425.16, subd. (e)(1).) Accordingly, the record is sufficient to establish that this cause of action is based on appellants' acts "in furtherance of [their] right of petition . . . under the United States or California Constitution in connection with a public issue" (*id.*, subd. (b)(1)), as that phrase is defined under subdivision (e) of the anti-SLAPP statute. (See *Navallier v. Sletten*, *supra*, 29 Cal.4th at p. 90; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 907-908 [concluding that a cause of action for unfair competition was subject to section 425.16 where it "arose directly from [the defendant attorney's] acts or statements, or alleged acts or statements, made in connection with environmental litigation he was bringing on behalf of [clients]"].)

Appellants have thus satisfied the first prong of section 425.16 by making a prima facie showing that the acts providing the basis of Nawa's constructive fraud claim were performed in furtherance of their right of petition in connection with a public issue. (*Equilon*, *supra*, 29 Cal.4th at p. 67.) As such, the burden shifts to Nawa to show a

probability of prevailing on the merits of his claim. (*Ibid*.) As we have already set forth, "[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navallier v. Sletten, supra,* 29 Cal.4th at p. 89.)

Having reviewed the trial court's order denying the motion to strike, it appears the trial court never reached the second prong of the anti-SLAPP statute because it concluded "the action is based on Defendants [sic] disregard and noncompliance with a court order, there is no chilling effect to the right of free speech." (See *Equilon, supra*, 29 Cal.4th at p. 67 [the court only considers the plaintiff's probability of prevailing on the merits if the defendant makes a threshold showing that the cause of action arises from protected activity].) Nonetheless, given that the parties have fully briefed this issue on appeal, we conclude it is proper for this court to decide in the first instance whether there is a probability that Nawa will prevail on the merits of his constructive fraud claim. (See *Navallier v. Sletten*, *supra*, 29 Cal.4th at p. 95 [remanding to the Court of Appeal to decide in the first instance whether the plaintiffs had established a probability of prevailing on the merits where the parties had briefed the issue on appeal].)

In arguing that Nawa cannot prevail on the merits of his constructive fraud claim, appellants raise as an affirmative defense the litigation privilege codified in Civil Code section 47, subdivision (b) (hereinafter, section 47, subdivision (b)). Under section 47, subdivision (b), communications made as part of a judicial proceeding are absolutely privileged. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [*Silberg*]; Civ. Code, § 47, subd. (b); *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 [*Action Apartment*].) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg, supra,* 50 Cal.3d at p. 212.) "Although originally enacted with reference to defamation [citation], the

privilege is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.]" (*Ibid.*)

The litigation privilege is intended to provide participants in judicial proceedings "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]" (*Action Apartment, supra,* 41 Cal.4th at p. 1241.) Accordingly, the privilege is interpreted broadly to apply "to *any* communication . . . having 'some relation' to a judicial proceeding," irrespective of the communication's maliciousness or untruthfulness. (*Kashian, supra,* 98 Cal.App.4th at pp. 912-913, 920; *Action Apartment, supra*, 41 Cal.4th at p. 1241; *Silberg, supra*, 50 Cal.3d at p. 216.)[6]

"If there is no dispute as to the operative facts, the applicability of the litigation privilege is a question of law. [Citation.] Any doubt about whether the privilege applies is resolved in favor of applying it. [Citation.]" (*Kashian, supra,* 98 Cal.App.4th at p. 913.)

Here, as explained above, the constructive fraud cause of action is based upon appellants' communications to Nawa and to the court during marriage dissolution proceedings between Nawa and Mrs. Nawa. As such, appellants' communications, whether fraudulent or not, fall squarely within the scope of the litigation privilege – to wit, they were made in litigation by persons legally authorized to participate in the litigation, they were designed to achieve the objects of the litigation, and they were logically related to the litigation.[7] (*Silberg, supra*, 50 Cal.3d at p. 212. See also *Kashian*

---

[6] In *Silberg,* the California Supreme Court acknowledged that strict application of the litigation privilege means some plaintiffs must forfeit compensation for injuries resulting from false statements made by defendants in litigation. However, the court noted that the "[t]he salutary policy reasons for an absolute privilege supersede individual litigants' interests in recovering damages for injurious publications made during the course of judicial proceedings." (*Silberg, supra*, 50 Cal.3d at p. 218.)

[7] An exception to the litigation privilege exists where the communication was made in connection with judicial proceedings instigated in bad faith. (E.g., *Action Apartment, supra,* 41 Cal.4th at p. 1251.) Here, however, there has been no allegation that marriage dissolution proceedings between Nawa and Mrs. Nawa were instigated in bad faith. As such, we need not consider this exception for purposes of this appeal.

v. Harriman, supra, 98 Cal.App.4th at p. 920 ["communications made in connection with litigation do not necessarily fall outside the privilege simply because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal"].) Accordingly, Nawa cannot prevail as a matter of law on his constructive fraud claim because the litigation privilege serves as a complete bar to it. (E.g., *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913-915 [section 47(b) bars a claim that a witness gave false evidence on behalf of the plaintiff's former wife in marriage dissolution proceedings]; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489-490 [section 47(b) bars a lawsuit for allegedly preparing and presenting false documentation in connection with city planning proceedings]; *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 615-619.)

This conclusion is hardly unexpected. As our colleagues in the Second Appellate District, Division Eight, have noted, "[t]hat the litigation privilege operates as a bar to [the plaintiff's] claim should come as no surprise, given the congruity between protected activity within the meaning of the anti-SLAPP statute and the communicative conduct that is protected by the litigation privilege. . . . [Other] court[s] ha[ve] observed that clauses (1) and (2) of subdivision (e) of . . . section 412.16—the SLAPP statute—defining protected activity to include statements or writings made before a judicial proceeding or made in connection with an issue under review by a judicial body—'are parallel to and coextensive with the definition of privileged communication under Civil Code, section 47, subdivision (b).' [Citation.]" (*Gallanis-Politis v. Medina, supra*, 152 Cal.App.4th at p. 617. See also *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1115 [" '[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16' "]; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1287-1288 & fn. 23.)

Accordingly, the trial court's ruling with respect to Nawa's constructive fraud cause of action must be reversed.

II. Attorney's Fees and Costs.

We have thus concluded the trial court erred in denying appellants' special motion to strike with respect to the constructive fraud cause of action, but properly denied the motion with respect to the remaining causes of action. And, given their partial success on the motion, appellants may be entitled to recover attorney's fees and costs incurred in moving to strike the constructive fraud cause of action, but will not be entitled to recover those fees and costs incurred in moving to strike the remaining causes of action. (§ 425.16, subd. (c) ["a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020 ["defendants in this case should be considered prevailing parties, and therefore should recover attorney fees and costs, notwithstanding their partial success on their SLAPP motion. As with the federal civil rights statutes and the California Public Records Act, the differential standard for awarding fees reflects a preference for compensating parties who further the public policies underlying the SLAPP statute through their litigation efforts"].) Upon a proper application and showing by appellants, the trial court may thus award an appropriate amount of fees and costs to appellants. (*Ibid.*)

Section 425.16, subdivision (c), further states that "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c).) Below, the trial court made no such finding with respect to appellants' motion. As such, we remand to the trial court to determine in the first instance whether to grant Nawa's request for an award of "fees and costs in connection with opposing the motion" pursuant to this provision.

Finally, we note that a "statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. [Citations.]" (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500; see also *Liu v. Moore* (1999) 69 Cal.App.4th 745, 754.) Relevant here, section 425.16, subdivision (c), does not preclude recovery of attorney's fees on appeal. (*Ibid.*) Accordingly, upon

remand, the trial court should also consider the parties' respective requests for appellate attorney's fees to the extent based upon a proper application and showing.

DISPOSITION

The trial court's order denying appellants' special motion to strike is affirmed with respect to the causes of action for breach of fiduciary duty, breach of escrow agreement and order, and negligent infliction of emotional distress, and is reversed with respect to the constructive fraud cause of action. On remand, the trial court shall decide the parties' respective requests for attorney's fees and costs incurred below, and for attorney's fees incurred on appeal, in accordance with the standards set forth above. (§ 425.16, subd. (c).)

The parties shall on their own bear those appellate costs recoverable under California Rules of Court, rule 8.278. (See *Liu, supra*, 69 Cal.App.4th at p. 755 ["costs [awarded pursuant to California Rules of Court, former rule 26] do not depend on [a party's] status as the prevailing party on the motion to strike, but rather on her having prevailed in this appeal"].)

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.